ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of

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| Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts | ) ) ) ) | MM Docket No. 95-40 |

# COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

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## SUMMARY

The affiliation contract rules continue to play a valuable role in restricting the exercise of undue market power by the major television networks over their affiliates. By strengthening affiliates in their ability to bargain with their networks, the rules support localism and diversity in programming available to the public. In contrast to these benefits, the costs--both to the Commission and affiliates--in complying with the rules are negligible. Given the increase in the production of network programs by the major networks and recent attempts by the networks to dictate and control the content of their affiliates' programming, the affiliation contract rules are more needed today than at any time in the past. Repeal of these rules would be a giant step backward by this Commission in fulfilling its statutory mandate to protect the public interest.

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The Network Affiliated Stations Alliance ("NASA" or "Affiliates") is a coalition of the ABC, CBS and NBC Television Affiliate Associations and is comprised of some 650 television broadcast stations that are affiliated with the ABC, CBS and NBC Television Networks. NASA files these comments in response to the Commission's Notice of Proposed Rule Making, released April 5, 1995, in the above-captioned proceeding ("Notice").

NASA strongly opposes repeal or modification of the requirement that television network affiliation contracts be filed with the Commission and the requirement that these contracts be made available for public inspection.[1] In support thereof, it is shown as follows:

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[1] 47 C.F.R. §73.3613 provides: "Each licensee or permittee of a commercial or noncommercial . . . TV . . . broadcast station shall file with the FCC copies of the following contracts, instruments, and documents together with amendments, supplements, and cancellations (with the substance of oral contracts report in writing), within 30 days of execution thereof:

"(a) Network service: Network affiliation contracts between stations and networks will be reduced to writing and filed as follows:

(1) All network affiliation contracts, agreements, or understandings between a TV broadcast or low power TV station and a national network . . .

(2) Each such filing ... initially shall consist of a written instrument containing all of the terms and conditions of such contract, agreement or understanding without reference to any other paper or document by incorporation or otherwise. Subsequent filings may simply set forth

## SUMMARY

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## BACKGROUND

The affiliation contract rules have long been part of the framework for this Commission's regulation of the relationship between networks and their affiliates. Concern over the implications of specific terms of affiliation agreements for the public interest was voiced in the

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renewal, amendment or change, as the case may be, of a particular contract previously filed in accordance herewith.

(3) The FCC shall also be notified of the cancellation or termination of network affiliations, contracts for which are required to be filed by this section."

As further discussed below, the Commission has also required that affiliation agreements be available as part of a station's public inspection file. 47 C.F.R. §73.7326(a)(3). Unless otherwise indicated, these requirements, collectively, are referred to herein as the "affiliation contract rules" or merely the "rules."

Report on Chain Broadcasting issued in 1941[2] which led to the rule requiring the filing of radio network affiliation contracts. The network radio rules were applied to television in 1946[3], and the Barrow Report[4] of 1957 contained a recommendation that affiliation agreements be made available for public inspection.

The Commission in response to the enactment of the Freedom of Information Act (FOIA)[5] amended the rules in 1969 to make network affiliation contracts available to the public.[6] Rejecting arguments against public disclosure of affiliation contract terms, the Commission concluded:

> Our action will directly serve the public interest in the fostering and maintaining of a national competitive broadcast structure. We believe that publication of affiliation contracts will make a major contribution toward this objective. It will enhance and intensify competition among broadcasters and will equip licensees and the public with additional information relevant to the public interest. Id., 16 FCC 2d at 977.

Referring to the Barrow Report, the Commission observed:

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[2] Report on Chain Broadcasting, Commission Order No. 37; Docket 5060 (May, 1941), modified, Supplemental Report on Chain Broadcasting (October, 1941), appeal dismissed sub nom. NBC v. United States, 47 F. Supp. 940(1942), aff'd, 319 U.S. 190 (1943). The filing of affiliation agreements for radio dates back to 1934. Broadcasting Division Order No. 2, 1 FCC 26 (1934).

[3] Rules Governing Television Broadcast Stations, 11 Fed. Reg. 33, 37 (January 1, 1946).

[4] Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (1957) ("Barrow Report"), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. (1958).

[5] Public Information Amendments to the Administrative Procedure Act, Pub. Law 89-554, SS 1, 80 Stat. 383, codified at 5 U.S.C. § 552.

[6] Public Inspection of Affiliation Agreements, Docket No. 14710, Report and Order, 15 RR 2d. 1579 (1969).

> . . .[T]he Commission's network study staff concluded in 1957 that disclosure of such information would be in the public interest. It would aid stations in their bargaining with the networks by making information available to one side to the same extent it is to the other. Id., (emphasis supplied).

Thus, the Commission's requirement that affiliation contracts be filed and made publicly available has been premised--correctly--on the belief that competition would be enhanced by allowing affiliates access to the same affiliate contractual information that is available to their networks.

The Commission reexamined this entire issue just a few years ago. In 1985 it conducted a broad review of the affiliation contract filing requirement. The Commission determined at that time that the affiliation contract rules should be eliminated for radio licensees based upon a finding that the costs of the rules exceeded their benefits.[7] With respect to television contracts, on the other hand, the Commission concluded that the requirements should be retained. Summarizing the need for and purpose of these rules, the Commission said:

> The Commission has decided to retain the requirement that television licensees file national network affiliation contracts with the Commission. . . . The number of national network organizations and program outlets is more limited for television than for radio. Moreover, the amount of network programming carried by individual TV stations is greater than that carried by network affiliated radio stations. Therefore, the potential for any one network organization to exercise undue influence over an affiliate is greater for a television station than for a radio station. The Commission believes that continued scrutiny of the television national network/affiliate relationship is therefore warranted. Id., mimeo at 4.

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[7] Radio Network Affiliation Agreements, MM Docket No. 85-5, Report and Order, 101 FCC 2d. 516 (1985).

The issue now posed by the Commission in the Notice, in essence, is whether the cost-versus-benefit balance of these rules has so changed as to warrant a different conclusion. The answer is, clearly, no.

## I.

## CHANGES IN THE VIDEO MARKETPLACE SINCE 1985 HAVE ONLY INTENSIFIED THE NEED FOR, AND THE PUBLIC INTEREST BENEFITS OF, THE AFFILIATION CONTRACT RULES

The Commission in the Notice has pointed to changes in the video marketplace since 1985, particularly the increase in the number of stations available for affiliation and the emergence of aspiring networks. The Commission questions whether, in view of these changes, there is a continuing need for the contract filing requirements. Notice, ¶¶11-12. As a result of the changes in the marketplace, the Notice observes, "the bargaining positions of broadcast television networks and commercial broadcast television stations have changed and differ market by market." The recent affiliate switches, it indicates, demonstrate "increased competition between broadcast networks for affiliation with broadcast television stations in different markets" and "suggest that broadcast networks' market power over their affiliates has diminished to some extent." Id., ¶11.

Notwithstanding various other market changes, there has been no change in the relationship between networks and affiliates that would warrant relaxation of the affiliation contract rules. Market changes, in fact, have served only to intensify the need for these rules. Most notably, in recent years the major television networks have emerged as vertically integrated program producers and suppliers. Upon repeal of the financial interest rule, the networks have

begun to invest heavily in the production of programming, and the pressure on affiliates for clearance of programming produced by the networks has only increased. Similarly, with the elimination of the syndication rule the networks have focused upon the aftermarket as a vital source of profits. Successful first run exhibition on a network is critical to the syndication success of network owned programs in the aftermarket. The pressures from the networks for clearances have intensified with these changes. The networks now have more financial and economic incentive than ever to exert pressure on their affiliates for comprehensive clearance of network program schedules. And "pressuring" their affiliates for clearance of network programming is precisely what the networks have recently been doing. Nowhere is this new "pressure" more apparent than in the terms of the more recent versions of network affiliation agreements. The program clearance provisions of the new affiliation agreements bear scant resemblance to those historically used by the networks. These agreements exact heavy economic penalties from affiliates for failure to clear virtually all network programming. They are punitive in nature.

Moreover, within the last three years, the Commission repealed the rule which limited the term of affiliation contracts to two years.[8] In the wake of that action, the networks in most instances have been insisting that affiliation contracts have a term of ten years. As a consequence of all these changes, negotiations over affiliation agreements today are far more

[8] Review of Rules and Policies Concerning Network Broadcasting By Television Stations: Elimination or Modification of Section 73.658(c) of the Commission's Rules, 4 FCC Rcd. 2755, 66 R.R.2d 190 (1989).

extensive and far more complex than in the past. And these negotiations have become all the more crucial to the financial and economic stability of local affiliates.

The affiliation contract rules have played and continue to play a vital role in the effort to introduce equity and competitive balance in the affiliation negotiation process. The networks, because they have agreements with each of their affiliates, have ready access to comprehensive data on affiliate compensation, program clearance requirements and practices, and other issues bearing upon the network/affiliate relationship. Absent the Commission's affiliation contract rules, affiliates would not. At least one of the networks is demanding from some of its affiliates, as a condition of affiliation, that the affiliate redact key data and information from its affiliation contract. Obviously, the network believes its negotiating leverage over other affiliates will be enhanced if the other affiliates are kept in the dark.

In yet another twist to recent network negotiating tactics, at least one network has demanded of a group broadcast owner that has a station affiliated with another network that the company furnish the network a copy of its affiliation contracts with other networks. Thus, the networks--by virtue of their superior bargaining power--will manage one way or another to learn what their competing networks are doing. Affiliates, unfortunately, cannot if these rules are repealed.

As the Barrow Report recognized long ago, the rules thus help to level the bargaining leverage between networks and their affiliates by providing an affiliate with access to the same level of information about program clearance requirements, compensation and other affiliation terms that is possessed by the affiliate's network. If the rules were eliminated, the networks would continue to possess this information, but affiliates would not. These rules thus facilitate a

more competitive balance between the individual affiliate, on the one hand, and its ubiquitous network, on the other.

From a broader perspective, the rules promote the efficient and cost-effective flow of information in the broadcast marketplace. They facilitate the competitive process by affording more equitable access to market information by an important segment of the market, i.e., affiliates. Moreover, to the extent they strengthen local affiliates vis-a-vis the networks and enhances their ability to provide programming responsive to their communities' needs and tastes, the rules foster healthy competition among affiliates at the local level. The rules thus serve the Commission's twin goals of diversity and competition.

The Commission has long recognized that the networks are in a dominant position relative to their affiliates. Affiliates are dependent upon their networks both for compensation and for the majority of their programming.[9] Affiliation has always been of enormous financial importance to a television station. It is just as important today as ever before. As Owen and Wildman, the economists quoted by the Commission in the Notice, pointed out: "Most stations consider network affiliation their most important single asset, next to their FCC license."[10] Affiliation is all the more critical to small market stations which, unlike major market stations, are not sought out by national advertisers and whose network compensation literally makes the difference, in many cases, between solvency and insolvency.

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[9]Amid the various changes alluded to in the Notice, affiliate dependence upon network programming has remained constant: The networks account for 70% - 80% of affiliate programming today, the proportion prevailing in 1985.

[10]B.M. Owen and S.S. Wildman, Video Economics, Harvard Univ. Press (1992) (hereinafter "Owen and Wildman").

Contrary to the suggestions contained in the Notice, the changes occurring since 1985 do not lessen the importance of the affiliation contract filing rules. It is true that new networks have come into being, but as the Notice acknowledges only one--Fox--has sufficient programming and geographic reach to come within the contract filing rules. The other incipient networks, United Paramount and Warner Brothers, have yet to develop to the point where they offer 15 or more hours of programming per week to 25 or more affiliates in 10 or more states. In contrast, the growth in the number of commercial broadcast stations available for affiliation has been dramatic. According to data submitted on behalf of the networks in MM Docket No. 94-123, the average number of commercial independent stations in the top 50 markets is now 5.8.[11] In the top 100 markets, which comprise 86% of U.S. TV households,[12] in addition to 290 VHF stations there are 396 UHFs--an average of 6.9 total stations per market.[13] "Networks have a bargaining advantage," it has been observed, "where the number of potential affiliates exceeds the number of available networks."[14] To the extent there is an imbalance in the marketplace, it is, clearly, an imbalance that favors the networks.

It is a constant of this Commission's jurisprudence that the relationship between the broadcast networks and their affiliates raises important public interest considerations. Maintaining a healthy balance of power in this relationship is vital to preserving local affiliates'

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[11]Comments of Economists Incorporated, MM Docket No. 94-123 (March 7, 1995) at 10.

[12]Nielson Station Index, U.S. Television Household Estimates, September 1994, p. 2.

[13]Paul Kagan Associates, Broadcast Statistics, September 30, 1994, p. 5. For the top 125 markets covering 91.5% of U.S. TV households, there are a total of 802 commercial stations for an average of 6.4 per market.

[14]Owen and Wildman at 167.

ability to select and air programming that meets the needs and tastes of their communities. The affiliation contract filing rules remain an integral part of this balance. The Affiliates submit that the changes occurring since 1985 only magnify the benefits of the rules and make it all the more important that network affiliation contracts continue to be publicly filed and available to affiliated stations, to the public and ultimately to the Commission.

## II.

## THE COSTS ASSOCIATED WITH THE RULES ARE MINUSCULE AND ARE SUBSTANTIALLY LESS THAN THE BENEFITS

In contrast to the significant competitive and public interest benefits to which the rules give rise, the costs of compliance are de minimis. The direct costs to affiliates, first of all, are practically nonexistent. They would consist of making a photocopy of a 10-12 page document and mailing it to the Commission. The Commission incurs only a marginally greater expense of maintaining these contracts on file and allowing public access to them. No Commission review or approval of the contracts is required. These costs are truly minor.[15]

The Notice questions, however, whether there are "indirect" costs that outweigh the benefits of the rules. Citing various writings, principally from the antitrust arena, the Notice speculates that "[b]y making compensation or other data in these filings publicly available, [it] may facilitate the ability of parties either seeking or offering affiliation to avoid competition." Notice, ¶15. As the sources cited in the Notice reveal, however, views on this topic are neither

[15]In the not-too-distant future when these documents can be filed electronically and made available on-line, the Commission's administrative costs will be virtually nil.

uniform nor absolute. For example, Prof. Posner has stated: "The direct or indirect exchange of price information by competitors can serve pro-efficiency purposes even in markets with only a few sellers."[16] One of the articles cited in the Notice observes: "The crucial determinant of whether the procompetitive effects outweigh the anticompetitive effects of transaction data exchanges in a given industry will ordinarily be a function of the industry's structure and basic operating conditions."[17] As discussed above, given the special relationship between networks and affiliates and the imbalance in power and access to information between them, making the information available to affiliates is procompetitive.

Moreover, as far as collusion among affiliates is concerned, the suggestion that it might occur, first of all, is without factual basis. The hypothetical posited in the Notice is that "in markets where there are more broadcast networks seeking affiliation agreements than commercial broadcast stations available, commercial stations could seek to ensure that the compensation that each of them receives is higher than the compensation any one of the alone was willing to accept." Notice, ¶15. Contrary to the premise on which this concern rests, however, there are few areas in which there are not at least four commercial broadcast stations available for affiliation.[18] Thus, there is simply no empirical basis to support a theoretical fear of collusion among affiliates in a market.

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[16] R. Posner, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 Geo. L. J. 1187, 1203 (1979).

[17] Donald S. Clark, Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp., 1983 Wis. L. Rev. 887, 900-901, cited at Notice n. 31.

[18] See, text at notes 11-13, above. As stated in the Notice, the rule applies only to agreement with broadcast television networks that offer 15 or more hours of programming per week to 28 or more affiliates in 10 or more states; it thus applies to ABC, CBS, NBC and Fox.

In the "real world," affiliates are not concerned with what a competitive network required and demanded of its affiliate in that affiliate's local market, but rather what its own network demanded and required of affiliates in other markets--i.e., in markets in which the affiliate does not compete. Access to that information by the affiliate about what its network is requiring in other, non-competitive markets gives the affiliate access to the same pool of information that its network has--thus, helping to close the information gap and creating more competitive bargaining between the affiliate and its network.

In short, access to this information is distinct from the context which may give rise to concerns about the use of such information to monitor or enforce some form of price agreement or "cartel-like" behavior among competitors. Rather, as indicated above, affiliates seek this information out of self-preservation and protection as against their "buyers" of time--i.e., their networks--not the local affiliates of other networks. Too many factors affect the terms of an affiliation arrangement to render agreement between affiliates of different networks plausible. Instead, affiliates are interested in gaining information concerning their own network and its dealings in other markets to verify that they are being treated equitably. A failure by the Commission to understand and appreciate fully the significance of this distinction will ultimately lead to a failure to understand the competitive importance of these rules.

Alternatively, the Notice observes in markets where there are more commercial stations than broadcast networks seeking affiliation agreements, "networks might seek, through parallel action, to lower the compensation they pay potential affiliates and could use the public filing to ensure each party is performing as agreed." Id. Whether it is realistic, given all the variable factors across television markets, to expect three or four networks to agree to limit compensation

on a market-by-market basis is questionable as a practical matter. It seems all the more unlikely that making affiliation agreements public, after the fact, would materially facilitate monitoring or enforcement of such agreement, if it existed. In view of the trend toward longer 10-year terms for affiliation contracts, it is difficult to see how ex post disclosure could play any anticompetitive role. Perhaps most telling is that those who might advocate elimination of the filing requirement in this context presumably would do so in the name of "protecting" affiliates from anticompetitive conduct. As evidenced by these comments, however, those (i.e., affiliates) who believe that competition would be enhanced by the rules and who stand to lose more than anyone if it is not are strongly in favor of maintaining public access to this information.

Finally, it is suggested in the Notice that the current rules may impair a network's ability or willingness "to craft contractual arrangements with one affiliate to recognize special market conditions of that affiliate." Notice, ¶16. This comment in the Notice reflects a fundamental lack of knowledge and familiarity with the terms and contents of network affiliation contracts. The Commission only has to look at its own files to see that these contracts are--and always have been--very market specific. Market conditions are always unique, and the arrangement in one market may not be suitable elsewhere. There will be no need to insulate the networks from requests by other affiliates for similar arrangements. The fact is, however, that the kinds of innovations developed to aid networks and affiliates in meeting specific local conditions in one market may be useful in other markets. As noted earlier, the networks would have access to that information--without these rules, affiliates would not. By virtue of the filing requirements, these innovative arrangements will be made available to "weaker" affiliates who would not otherwise have access to them. As correctly observed in the Notice with respect to the issue of

compensation, "public filing of these contracts enables weaker affiliates to ensure that they receive comparable or competitive compensation . . . thereby strengthening their overall financial condition and ability to serve the public." Notice, p. 16.

Finally, the Notice is only partially accurate with respect to the value of access to these contracts by weaker affiliates. Access to the information assures weaker affiliates only the knowledge about compensation in other markets--they still must negotiate. But this knowledge is helpful. The same is true of non-monetary terms and conditions aimed at improving network/affiliate performance in local markets.

In short, the Commission's filing and disclosure requirements, rather than imposing indirect costs, have positive benefits for the broadcast industry and for the public.

## III.

## NONE OF THE PROPOSED MODIFICATIONS OF THE RULES IS MERITORIOUS

The Notice contains various alternative proposals for alteration or elimination of the filing and disclosure requirements. Because we believe the fundamental balance between the benefits and costs of the rules is unchanged, we believe there is no basis for modifying the rules. Each of the suggested alternatives is logically or factually flawed or is otherwise without merit.

First, the Notice proposes the elimination of the Commission filing requirement and inquires whether affiliation contracts should be made available upon request from the Commission based upon complaints by affiliates or members of the public. Notice ¶17. It is far-fetched, however, to expect an affiliate to file a complaint against its network short of an

irrevocable rift in the relationship. Not more than a handful of such complaints of any kind have ever been filed in the entire history of the Commission. Affiliates are simply not going to publicly pick a fight with their networks--who are their largest provider of programming (some 70% to 80% for ABC, CBS and NBC affiliates)--and a critically important source of revenue. Upon what grounds, moreover, would an affiliate complain if it wished (as stated in the Notice) to "ensure that it is receiving comparable or competitive compensation to other affiliates . . . "? Notice, ¶16. It is not apparent what substantive grounds would exist for such a complaint. This proposal, in other words, would either eliminate the availability of contract information, generally, or it would create substantial new costs and burdens for affiliates (and for the Commission in adjudicating these access complaints) and members of the public by requiring them to file formal proceedings to gain access to the information. Neither is defensible in terms of efficacy, efficiency or cost or is in the public interest.

Second, the Notice suggests that the filing requirement could be retained but access limited to FCC employees in order to preserve confidentiality. That approach would gut the effectiveness of the rules for affiliates as well as members of the public. On what basis would the Commission reverse its affirmative decision in 1969 that this information should be available pursuant to the Freedom Of Information Act? To do so would be an unacceptable and unjustifiable retreat from the principles underlying the FOIA.

The third alternative for modifying the rules set out in the Notice would be to require that only redacted copies of affiliation contracts be made available to the public. Notice, ¶19. These copies would "omit any references to the values which determine this affiliate compensation and, possibly, other business sensitive terms." Id. This approach would render the rules meaningless,

however, by allowing the salient information to be obliterated. Moreover, it would only be likely to create new controversies and burdens for the Commission in attempting to define and enforce the extent to which information could appropriately be withheld. Again, neither result would be desirable or consistent with the public interest.

## CONCLUSION

For the foregoing reasons, the Affiliates respectfully submit that the Commission's affiliation filing and disclosure requirements produce benefits well in excess of any direct or indirect costs and should be retained.

Respectfully submitted,

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